Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

D.A.S. SAND & GRAVEL, INC.,

Petitioner,

v.

ELAINE L. CHAO, United States Secretary of Labor,
MINE SAFETY & HEALTH ADMINISTRATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Second Circuit affirmed The Mine Safety Health Administration's ("MSHA") jurisdiction over petitioner, *D.A.S. Sand and Gravel, Inc.*, based on § 4, the jurisdiction clause, of the Federal Mine Safety and Health Amendments Act of 1977 ("The Mine Act" or "the Act") Pub. L. No. 95-164, 91 Stat 1290, *codified at* 30 U.S.C. § 801, *et seq*. The agency claims Congress intended to regulate mines to the full extent of its power under the Commerce Clause even though the statutory term 'affecting . . . commerce' is clearly qualified and reads ". . . mine, the products of which enter commerce, or the operations or products of which affect commerce." Neither the Agency nor the Second Circuit give any meaning to the qualifying words "products of which" included two times, with the statutory term affecting commerce. Giving no meaning to the qualify words of the statutory term 'affecting commerce' is directly contrary to numerous recent rulings of this court.

Three questions are presented:

1. May an administrative agency, MSHA, give no meaning to words the Congress included in a statute that clearly qualify the statutory term 'affecting . . . commerce'?

2. Did Congress directly speak to the issue of its alleged intent to regulate every mine possible to the full extent of the Commerce Clause?

3. Is there a reasonable alternative interpretation of the statute that gives meaning to the qualifying words yet still authorize regulation to the extent that other parts of the statute indicate?

CORPORATE DISCLOSURE STATEMENT

Petitioner, D.A.S. Sand and Gravel, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINION BELOW

The initial opinion of the United States Court of Appeals for the Second Circuit is reported at *D.A.S. Sand and Gravel, Inc. v. Elaine L. Chao, United States Secretary of Labor, et al.*, 370 F.3d 309 (2d Cir. 2004).

The opinion was amended on October 14, 2004, 386 F.3d 460 (2d Cir. 2004) (Appendix A). The Second Circuit affirmed the July 7, 2003 decision of the Federal Mine Safety and Health Review Commission, *see Secretary of Labor v. D.A.S. Sand and Gravel, Inc.*, 25 FMSHRC 364, 367 (Appendix C).

STATEMENT OF JURISDICTION

A timely petition for rehearing was denied on October 15, 2004 (Appendix D).

This Court's jurisdiction is pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution Commerce Clause.

Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290, *codified at* 30 U.S.C. § 801, *et seq.* Sec. 4. The pertinent provisions are set forth in Appendix E.

STATEMENT OF THE CASE

Respondent, Elaine L. Chao, as United States Secretary of Labor, through her agents cited and fined petitioner, D.A.S. Sand and Gravel, Inc. (DAS) for alleged regulatory violations. D.A.S. contested the citations before an Administrative Law Judge of the Federal Mine Safety and Health Review Commission ("the Commission"), claiming the Commission did not have jurisdiction over petitioner's "mine".

Respondents claim that the language of the Mine Act unambiguously expresses Congress's intent to regulate mines to the full extent of its power under the Commerce Clause. This interpretation primarily rests on the statutory term 'affecting ... commerce' found in the *Mine Act*. Those two words are qualified in the statute and the Act actually reads: (a mine) "the products of which enter commerce, or the operations or products of which affect commerce."

The thrust of respondent's argument is that the statute as a whole indicates an intent of Congress to regulate all mines to the full extent possible under the commerce clause.

Respondent Commission never gives a meaning to the qualifying words used twice by Congress in the same paragraph of the Mine Act, "the products of which ..." Respondent Commission quotes committee reports and other portions of the Mine Act, but never gives meaning to the qualifying words when it is well known and even cited by the Commission that the statutory term "affecting commerce" *unqualified* indicates an intent by Congress to regulate to the full extent of its power under the commerce clause. D.A.S. argued that by qualifying a well known statutory term, twice, in the same statute, Congress must have intended not to

regulate every Mine to the full extent of its power under the Commerce clause. D.A.S. argued an alternate jurisdictional intent that does not conflict with the other portions of the statute or committee reports cited by respondent commission.

D.A.S. contested citations issued by Respondent and in a decision dated July 7, 2003, the MSHA administrative Judge held that the Act did afford jurisdiction to MSHA. D.A.S's time petition to the Commission for discretionary review was denied, August 18, 2003. D.A.S. timely appealed to the Second Circuit Court of Appeals, which in a decision of May 26, 2004, affirmed the lower decision. D.A.S. filed a timely Petition for a Rehearing En Banc. The Second Circuit Court of Appeals denied the petition for rehearing and amended its decision on October 14, 2004.

REASONS FOR GRANTING THE PETITION

Whether qualifying language of a well known statutory term can be ignored and given no meaning is an important question. This Court in recent decisions *Jones v. United States*, 529 U.S. 848,.854 (2000) and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps. of Engineers*, 531 451, 59 (2001), (SWANCC), has stressed that even one word that qualifies the statutory term "affecting commerce" must be given "some effect."

The Second Circuit ignores this Court's requirement that when a well known statutory term such as "affecting commerce" is qualified in a statute by Congress those qualifying words must be given meaning. The Mine Act's jurisdictional clause contains the term "affecting commerce" but the term is qualified twice by the words "the products of which" Section 4 of the Mine Act, 30 U.S.C.S. § 803.

Review by this Court is necessary to confirm that agencies are not to assume that Congress intended to regulate to the full extent of its power under the commerce clause when it qualifies the well known statutory term "affecting commerce". The Second Circuit gives no meaning to the qualifying words in the Mine Act. This Court is clear that qualifying words involving such a well known statutory term must be given some meaning. The Second Circuit gives the qualifying word "products of which" no meaning or reason for their existence. *Ibid.*

Review by this court will prevent other circuits from using this case to ignore this court's directives in *Jones* and *SWANCC* that qualifying words regarding the statutory term "affecting commerce" must be given some meaning *Jones*, 854, *SWANCC* 172.

1. Review Is Warranted To Rectify A Ruling That Directly Contradicts Recent Rulings By This Court.

This Court in *Jones*, 854 and *SWANCC*, 172, has stressed the importance of one or two qualifying words in conjunction with the statutory term "affecting commerce". In *SWANCC* 172, 173, this Court stresses the need to give qualifying words meaning that avoids constitutional questions if it is not plainly contrary to the intent of Congress. The Second Circuit is in direct contradiction with this Court, by giving no meaning to the qualifying words "products of which" in the Mine Act and not considering an alternate "acceptable construction" of the statute that does not raise constitutional questions. *D.A.S. Sand & Gravel, Inc. v. Elaine L. Chao United States Secretary of Labor, et al.*, 370 F.3d 309 (2d Cir. 2004).

The Second Circuit ruling dos not give any independent meaning to the qualifying words "*products of which*" enter commerce. . . ." found in the Mine Act. The Chief Justice in *SWANCC* indicated that regarding the single word "navigatable" ". . . it is one thing to give a word limited effect and quite another to give it no effect whatsoever" *SWANCC*, 172. He further noted

> where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.

The Second Circuit ignores both of these directives of the Chief Justice. The Second Circuit gives the qualifying words "products of which" no effect whatsoever. Mine Act § 803. The Second Circuit then interprets the statute to push the limit of Congressional authority based on a senate committee report that has two interpretations, one of which does not require a constitutional question.

The Second Circuit gives no explanation as to why the words "products of which" that are in the statute and qualify the statutory term "affecting commerce" should be given no meaning or purpose an alternate meaning.

The Second Circuit also ignores an alternate meaning for the Senate Committee report language and does not explain why the alternate meaning that does not create a constitutional question should not be preferred. S. Rep. No. 96-181, at 14.

Review is appropriate so that the lower courts will give appropriate meaning to directives by this Court. The Second Circuit did not even attempt to distinguish *SWANCC*'s directives from its interpretation of the *Mine Act* and it completely ignored the importance this Court gives words that qualify the statutory term "affecting commerce", in *Jones* 854.

2. The Lower Courts Ignore The Qualifying Words Of The Statute By Using Expansive Committee Language That Clearly Has Two Possible Meanings, One Of Which Would Avoid Serious Constitutional Questions.

The Second Circuit and original Administrative Judge cite a Senate Committee's report to justify the assumption that "Congress intended to "invoke its full power under the commerce clause" *D.A.S. Sand and Gravel Inc. v. Chao*, 386 F.3d 460, 463. The committee cite does not contradict the qualifying words of the statute or appellant's interpretation of the statute; "[I]t is the Committee's intention that *what* is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation; .. ." Emphasis added, S. Rep. No. 96-181 at 14 (May 15, 1977).

What is a mine reasonably concerns the definition of the word mine. Often a mine is thought of as an underground shaft. An operation in which product is stripped from the surface is often called a quarry or pit. In fact, in Webster's New World Dictionary the first definition of the word mine ends with the phrase "distinguished from quarry." Therefore, it is reasonable to interpret the committee expansive language as meaning that they intend to regulate quarries, strip mines, as well as, mines with underground shafts. The committee's language makes no mention of also regulating every mine

no mater how small or intrastate to the full extent of its power under the commerce clause. It is far more reasonable that Congress did not want a huge international operation such as Kennecott Copper to avoid regulation by arguing it had no underground shafts. The Committee's language quoted by the Second Circuit involves "what is considered a mine" not *which* mines are to be regulated. S. Rep. This reasonable explanation of the committee's language avoids a Constitutional question.

The other statutory language cited by the Second Circuit does not contradict this interpretation; "Section 2 of the Act, why it was adopted" an urgent need to . . . improve the working conditions and practices in the Nation's coal or their mines," because "the disruption of production and the loss of income" caused by mine accidents and related illnesses "unduly impede and burden commerce". All of these economic effects are addressed by the regulation of interstate mines whose products affect commerce and does not infer the need to include every little intrastate gravel pit. Congress by clearly being expansive on its interpretation of "what is a mine" would need some restriction on *which* mines to regulate, otherwise, any commercial excavation of every kind would be subject to the *Mine Act*. Every mine subject to the *Mine Act* is required to be inspected twice a year. *Mine Act*. If that was the intent of Congress it would have employed thousands of additional agents because such an interpretation would include hundreds of thousands of farms, construction sites, highway departments, etc.

A simple and constitutional restriction on which mines are to be regulated is included in the statute "each mine . . . , the products of which affect commerce" . . . Therefore, it is reasonable to assume Congress did not intend to regulate small intrastate mines whose products are used locally such as petitioner's.

If Congress had any intent to regulate to the extent suggested by the Second Circuit it would have simply said "each mine that affects commerce", that would have indicated there desire to use the full extent of their power under the commerce clause. It did not do that. Congress qualified a well known statutory term. It is reasonable that it did.

3. The Decision Of The Second Circuit Should Be Reviewed Because It Raises Constitutional Questions That Are Not Required By The Language Of The Statute.

This Court in *SWANCC*, 173 has made it clear that constitutional questions are to be avoided if the statute allows such an interpretation. The Second Circuit approaches the Mine Act in the opposite direction. It ignores qualifying words to the statutory term "affecting commerce" and then it does not consider alternate interpretations of committee reports or other statutory language.

In its decision the Second Circuit does not explain why it reads the committee's language "what is a mine" to include *which* mine. S. Rep No. 96-181 at 14. An expressed desire to have an expansive interpretation of "what is a mine" does not contradict simultaneous desire to restrict *which* of the mines to regulate. That more restriction language is clearly included in the statute's Section 803 "Mines subject to Coverage. Each coal or other mine, the *products of which* enter commerce .. ." (Emphasis Added).

The Second Circuit contradicts this court in *SWANCC* by failing to consider, never less give preference to the alternate interpretation offered by petitioner, D.A.S. Sand and Gravel, Inc., that does not raise Constitutional Questions.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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